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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1249

AMERICAN STEVEDORES, INC.,

Petitioner,

—against—

OLAF PEDERSEN'S REDERI A/S,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the

Supreme Court of the United States

October Term, 1975

No. .....

American Stevedores, Inc.,

Petitioner,

—against—

Olaf Pedersen's Rederi A/S,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

This case began as an action by one Joseph Rodriguez to recover damages for personal injuries which he sustained on July 3, 1967, while working as a longshoreman in the employ of American Stevedores, Inc. aboard the m/s Sunny Prince, a cargo vessel owned by Olaf Pedersen's Rederi A/S. American Stevedores, Inc., the petitioner herein, was one of two parties impleaded into the suit as a third party defendant.

Following a trial on the merits, the jury returned a verdict in favor of plaintiff on the grounds of negligence and unseaworthiness. Because of a further finding that plaintiff had been contributorily negligent, the award of

$80,000 was reduced to $35,000. A further jury finding that the vessel owner was not entitled to indemnity against plaintiff's employer was subsequently set aside by the Trial Judge and a new trial ordered on that issue. The judgment in favor of Rodriguez was satisfied by respondent and he has not since been involved.

After reassignment of the case to another District Judge and, prior to a second trial of the indemnity issue, the vessel owner moved for summary judgment against the stevedore. The motion was granted, *Rodriguez* v. *Olaf Pedersen's Rederi A/S,* 387 F. Supp. 754 (E.D.N.Y., 1974) and this decision was affirmed on appeal, —— F. 2d —— (2 Cir., 1975). Both opinions are included in petitioner's appendix. Respondent will not here belabor the facts of the case for, as noted by the Court of Appeals, ". . . [They] are set out in detail in Judge Neaher's thorough opinion, 387 F. Supp. 754 . . ."

Petitioner now seeks review of a number of issues, several of which are raised for the first time in this Court.

POINT I

The basic issue raised by the petition is one of limited application at present and, probably, will soon become moot.

Respondent submits that the basic issue here, discussed in Point II B of petitioner's brief, is whether the contributory negligence of an injured longshoreman, imputed to his employer on a shipowner's claim for indemnity, constitutes a breach of the employer's warranty of workmanlike performance as a matter of law. While the First, Second, Fourth and Ninth Circuits have answered in the

affirmative,* the Fifth Circuit has held that a finding of contributory negligence is but a factor to be considered in determining the employer's breach of warranty.**

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, this issue was one of continuing vitality, for in virtually all longshoreman personal injury cases the employer was inevitably impleaded under the doctrine of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). However, as recently pointed out by this Court in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) at p. 113, fn. 6, the intent and effect of the 1972 Amendments are to overrule the *Ryan* doctrine in all cases arising after their effective date.

In cases decided before the 1972 Amendments were enacted, attempts were made to interest this Court in the present issue but to no avail, *Hartnett* v. *Reiss S.S. Co.*, 421 F. 2d 1011 (2 Cir., 1970) cert. denied, *sub. nom., Grain Handling Co.* v. *Hartnett*, 400 U.S. 852 (1970); *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F. 2d 1334 (2 Cir., 1969) cert. denied, *sub. nom., Golten Marine Co.* v. *Trelleborgs Angfartygs A/B*, 395 U.S. 946 (1969). It came with

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* See, *Martinez* v. *Compagnie Generale Transatlantique*, 517 F. 2d 371 (1 Cir., 1975), cert. denied —— U.S. ——, 46 L.Ed.2d 636 (1976); *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F. 2d 1334 (2 Cir., 1969) cert. denied, 395 U.S. 946; *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F. 2d 26 (4 Cir., 1971); *Chinese Maritime Trust, Ltd.* v. *Carolina Shipping Co.*, 456 F. 2d 192 (4 Cir., 1972) and *Arista Cia. de Vapores S.A.* v. *Howard Terminal*, 372 F. 2d 152 (9 Cir., 1967).

** *Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 479 F. 2d 432 (5 Cir., 1973), cert. denied 414 U.S. 1093 (1973).

While it has been suggested that the Third Circuit, too, follows the factor approach, *Shaw* v. *Lauritzen*, 428 F. 2d 251 (3 Cir., 1970), a reading of that opinion shows that the court was not dealing with a specific finding of contributory negligence.

little surprise, then, that in cases decided after the enactment of the 1972 Amendments but arising prior to their effective date, petitions to review the issue met a similar fate, *Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 479 F. 2d 432 (5 Cir. 1973) cert. denied, *sub nom., Mitsui O.S.K. Lines, Ltd.* v. *Strachan Shipping Co.*, 414 U.S. 1093 (1973); *Santiago Martinez* v. *Compagnie Generale Transatlantique*, 517 F. 2d 371 (1 Cir., 1975) cert. denied, —— U.S. ——, 46 L.Ed. 2d 636 (1976).

The reluctance to disturb established principles in their twilight was recognized by the Court of Appeals in the instant case. As Judge Feinberg stated in the concluding paragraph of the Court's opinion:

> "Since future cases will be governed by the statute, the reexamination of the settled law of this Circuit which the Stevedore invites us to make would have only the most limited practical effect."

Respondent submits that, the opinion below expressing the better view of the issue, as discussed in Point II, *infra*, there is even less reason for review by the Court at this time.

POINT II

Petitioner owed to respondent a warranty of workmanlike performance under the facts of this case and the contributory negligence of the former's employee constituted a breach of that warranty as a matter of law.

It should be noted at the outset that in neither of the courts below did petitioner seriously contend that it owed no warranty of workmanlike performance to respondent under the facts of this case and, accordingly, no such issue

is discussed in either opinion. Respondent respectfully submits that petitioner should not now be heard to raise such an issue* for the first time in this Court, *Ellis* v. *Dixon*, 349 U.S. 458 (1955); *Lawn* v. *U.S.*, 355 U.S. 339, 362 (footnote); *California* v. *Taylor*, 353 U.S. 553, 557 (footnote); *United States* v. *Howard*, 352 U.S. 212, 217; *Weade* v. *Dichmann Co.*, 337 U.S. 801, 808.

(a) The Stevedores Warranty Exists Regardless of Shipowners Fault

Quite apart from the untimeliness of petitioner's contention, however, is its lack of merit. To contend that a stevedore's warranty of workmanlike performance is "judicially invoked" only in favor of a shipowner held liable for unseaworthiness and which is, otherwise, without fault, totally ignores a fundamental precept of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) where this Court held at p. 134:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

So. too, in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563 (1958), the Court noted at p. 569:

> ". . . In the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., supra (350 U.S. at 132, 133)."

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* Point II A. of petitioner's brief.

Finally, respondent would point to what petitioner at p. 18 of its brief, calls a well-reasoned decision in *DeGioia* v. *United States Lines Company*, 304 F. 2d 421 (2 Cir., 1962) where Judge Clark stated at p. 424:

> "Whether a hazard is created by the negligence of the shipowner or otherwise, the stevedoring firm is liable for indemnity if a workmanlike performance would have eliminated the risk of injury."

(b) Employee's Contributory Negligence—Breach of the Employer's Warranty of Workmanlike Performance as a Matter of Law

Petitioner concedes that the First, Second, Fourth and Ninth Circuits are in complete agreement that a longshoreman's contributory negligence, which is imputed to his employer on the issue of indemnity, constitutes a breach of the employer's warranty as a matter of law. In urging that this Court now adopt the Fifth Circuit "factor" approach of *Julian* v. *Mitsui O.S.K. Lines, Ltd.*, 479 F. 2d 432 (5 Cir., 1973), cert. denied, 414 U.S. 1093 (1973), petitioner disregards the well-reasoned dissent which would have followed the *per se* rule as well as the expressed reluctance of the majority to re-study the issue in view of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Again, in citing *Anzalone* v. *Moore-McCormack Line, Inc.*, 36 N.Y. 2d 684 (1975) affirming, without opinion, the Appellate Division's adoption, by a divided court, of the "factor" test, 43 A.D. 2d 818, petitioner overlooks this Court's admonition that state courts follow the decisions of the federal courts when determining issues of maritime law, *Robins Dry Dock Co.* v. *Dahl*, 266 U.S. 449 (1925).

In support of the *per se* approach of the First, Second, Fourth and Ninth Circuits, respondent returns to *Mc-*

Laughlin v. *Trelleborgs Angfartygs A/B*, 408 F. 2d 1334 (2 Cir. 1969) cert. denied, 395 U.S. 946, wherein the choice was carefully considered by the Second Circuit at p. 1336:

> "The similarity in name between negligence and contributory negligence masks an essential difference in concept. Whereas negligence is a breach of a duty to others and gives rise to a right in the person injured, contributory negligence is simply a disability preventing a plaintiff from recovering. See Restatement of Torts 2nd. §463 (1965); 2 Harper & James, Torts § 22.10 (1956); Prosser, Torts § 64 (2d ed. 1964). A rule whereby the employee's disability automatically creates a right in the shipowner to be indemnified by the employer can thus be sound only if the employer is deemed to have undertaken not simply to use reasonable care to select, train and supervise employees so that they will protect themselves, but to furnish employees who in fact will not negligently expose themselves to injury. If the warranty were only of the more limited sort, the contributory negligence of an employee, although some evidence of breach, would not alone support a verdict in favor of the indemnitee, let alone the direction of one.
>
> "We think however that under Italia Societa per Azioni v. Oregon Stevedoring Co., 376 U.S. 315, 84 S.Ct. 748, 11 L. Ed. 2d 732 (1964), the W.W.P. is not so limited."

Petitioner's attempt to "create" an intra-circuit conflict within the Second Circuit is without substance. In citing *Nye* v. *A/S D/S Svendborg*, 501 F. 2d 376 (2 Cir., 1974), cert. denied, 420 U.S. 964 (1975), petitioner fails to acknowledge the statement of the Court of Appeals, 501 F. 2d at 380:

> "The principles set forth in cases dealing with a stevedore's implied warranty of workmanlike performance are not applicable in this case."

In the instant case, the Court of Appeals made the distinction quite clear (petitioner's appendix, p. 6a) as it had previously done in *King* v. *Deutsche Dampfs-Ges*, 523 F. 2d 1042 (2 Cir., 1975).

POINT III

This Court's decision in *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) does not require reconsideration of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

In Point III of its brief petitioner would have the Court adopt a theory of contribution between shipowner and stevedore in lieu of the full indemnity concept of *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corporation*, 350 U.S. 124 (1956)—another argument which was not raised in either court below. In so doing, petitioner relies on *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) and *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106 (1974). While both cases did adopt theories of liability according to proportionate fault, neither involved a situation where one of the parties sought to be charged was the employer of an injured plaintiff and therefore not liable for contribution, as was the case in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). In fact, this very distinction was noted by the Court in *Cooper, supra*, when it stated, 417 U.S. 106 (1974) at 115:

> "In sum, our opinion in Atlantic was not intended to answer the question posed by the present case, as

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its failure to discuss Horton, Watz and Seaboard indicates. Rather, Atlantic proves only that our decision in Halcyon was, and still is, good law on its facts."

The *Atlantic* decision, referred to in the quote, is, of course, this Court's *per curiam* opinion in *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company*, 406 U.S. 340 (1972) which, in one brief paragraph, reaffirmed the vitality of *Halcyon*.

POINT IV

Petitioner was not denied a jury determination on the issue of conduct sufficient to preclude indemnity where the record discloses no evidence of such conduct.

On respondent's motion for summary judgment in the District Court, it was held that the contributory negligence of plaintiff, as previously found by the trial jury, was binding upon petitioner, his employer, and constituted a breach of its warranty of workmanlike performance as a matter of law. Petitioner then contended that, notwithstanding such breach, it was entitled to a jury trial on the issue of whether there was conduct on the part of respondent sufficient to preclude recovery in indemnity under *Weyerhaeuser S.S. Company* v. *Nacirema Operating Company, Inc.*, 355 U.S. 563 (1958). After noting that such issue was ordinarily a question of fact, Judge Neaher pointed out that:

"On this motion the parties are in agreement that there is no additional evidence. The Court must, therefore, decide whether on the essentially conceded facts a jury could reasonably infer that Pedersen's part in Rodriguez' accident constituted 'conduct on its part sufficient to preclude recovery' of indemnity from American."

Under the essentially conceded facts, Judge Neaher concluded that respondent had negligently created a dangerous condition aboard the vessel but that this did not prevent or seriously handicap the stevedore in his ability to do a workmanlike job under *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats*, 346 F. 2d 481, 484 (2 Cir., 1965) reversed on other grounds, 382 U.S. 283 (1965) and that it was actually the contributory negligence of petitioner's employee (plaintiff) which brought about his own injuries.

In affirming, the Court of Appeals observed (Petitioner's Appendix p. 7a):

> "The shipowner's fault was the creation of a potentially hazardous condition by uncovering the hatch square on the 'tween deck in hatch #2 and blocking off the light coming from above. Nothing about this negligence on the shipowner's part prevented or hindered Rodriguez from rendering a workmanlike performance, that is, from using the safe route between hatches that was available, or at least securing adequate illumination before venturing down a dark corridor into a dark hatch."

Reported cases generally acknowledge that this Court has not indicated, specifically, what would constitute conduct sufficient to preclude recovery under *Weyerhaeuser, supra.* It fell, therefore, to the lower courts to formulate a test against which a shipowner's conduct could be judged. In *Albanese, supra,* the Second Circuit stated the test as follows, 346 F. 2d at 484:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job."

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Despite petitioner's assertions to the contrary, the Second Circuit in the instant case held that the test today remains the same. Other Circuits, too, have followed the *Albanese* test, *Old Dominion Stevedoring Corp.* v. *Polskie Linie Oceaniczne,* 386 F. 2d 193 (4 Cir., 1967); *Tebbs* v. *Baker-Whiteley Towing Co.,* 407 F. 2d 1055 (4 Cir., 1969); *D/S Ove Skou* v. *Hebert,* 365 F. 2d 341 (5 Cir., 1966); *Victory Carriers, Inc.* v. *Stockton Stevedoring Co.,* 388 F. 2d 955 (9 Cir., 1968). The *Albanese* test having met with general acceptance, there would appear to be no reason to discuss the extensive quotation from *Badalamenti* v. *United States,* 160 F. 2d 422 (2 Cir., 1947) on pages 14-16 of petitioner's brief as that opinion, obviously, was written prior to the birth of the *Ryan* doctrine and was not concerned with the issues now before the Court.

Measured against the *Albanese* test, the conclusion is inescapable that respondent's negligence in no way effected Rodriguez' decision to proceed as he did and that his contributory negligence, as found by the trial jury, brought into play the unseaworthiness of the vessel within the meaning of *Crumady* v. *Joachim Hendrick Fisser,* 358 U.S. 423. With the parties in agreement that there was no further evidence to be adduced at a new trial, the cause was ready for summary disposition under Rule 56 of the Federal Rules of Civil Procedure in the District Court.

Petitioner's contention that it was denied trial by jury was, of course, considered by the Court of Appeals and rejected (petitioner's appendix p. 11a, fn. 4):

> "Our conclusion that the Shipowner's conduct did not preclude indemnity as a matter of law disposes of the Stevedore's contention that it was deprived of its right to have a jury determination of the issue. Although the Stevedore is correct that this is ordinarily

> an issue of fact, Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 567 (1958); Hurdich v. Eastmount Shipping Corp., 503 F. 2d 397, 401 n. 3 (2d Cir., 1974), the court of course remains free to direct a verdict where the evidence is insufficient to raise a jury question, and we have approved the trial judge's decision to do so in appropriate cases. See, e.g., Mortensen v. A/S Glittre, 348 F. 2d 383 (2d Cir., 1965)."

In like manner did the Court of Appeals dispose of an identical contention by the stevedore in *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F. 2d 1334 (2 Cir., 1969) at p. 1338:

> "We are reversing no jury determination here; the jury has found that McLaughlin acted unreasonably."

See also, *King* v. *Deutsche Dampfs-Ges,* 523 F. 2d 1042 (2 Cir., 1975) where the Court concluded its opinion, in a footnote, as follows:

> "We repeatedly have rejected appellants' further argument that the grant of judgment in favor of the shipowner on its indemnity claim against the employer of an injured plaintiff deprives the employer of its right to jury trial under the Seventh Amendment. See, e.g. *McLaughlin, supra,* 408 F. 2d at 1337-38; *Hartnett, supra,* 421 F. 2d at 1017-18. Liability is imposed as a matter of law on the employer of a contributorily negligent plaintiff once the jury has made its finding of contributory negligence. Since the dispositive issue is that of contributory negligence which is left to the jury, there is no usurpation of the jury's function."

The reference, on p. 10 of petitioner's brief to *International Terminal Operating Co., Inc.* v. *N.V. Nederl*

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A. S. M., 393 U.S. 74 (1968) may be somewhat misleading as it is a second consideration by this Court of some of the issues raised in *Albanese, supra.* To clarify any such potential misunderstanding, respondent would point out that, in reversing on the first occasion, 382 U.S. 283, this Court left undisturbed the test against which "conduct sufficient to preclude recovery" was to be measured. When the case returned to this Court, 393 U.S. 74 (1968) the sole issue presented was whether the stevedore-petitioner had breached its warranty of workmanlike service as a matter of law. Unlike the present case, there was no jury finding of contributory negligence on the part of the stevedore's employee, and, accordingly, this Court held that the initial question of whether there had been a breach of the stevedore's warranty should have been left to the jury.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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